INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

Organization of American States

OEA/Ser.L/V/II.54
Doc. 9 rev. 1
16 October 1981
Original: Spanish

# ANNUAL REPORT OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 1980-1981

## RESOLUTION 23/81
## Case 2141 (UNITED STATES)
## March 6, 1981

SUMMARY OF THE CASE

1. On January 19, 1977, Christian B. White and Gary K. Potter, filed with the Inter-American Commission on Human Rights a petition against the United States of America and the Commonwealth of Massachusetts for the purposes established in the Statute and Regulations of the Commission. The petition is accompanied by a cover letter of the Catholics for Christian Political Action, signed by Gary Potter, President.

2. The pertinent parts of the petition are the following:

> Name of the person whose human rights have been violated; "Baby Boy" (See Exhibit, p.ll, line 7 from top, and Amplificatory Document p. 1) Address: Boston City Hospital, Boston Massachusetts.Description of the violation: Victim was killed by abortion process (hysterectomy), by Dr. Kenneth Edelin, M.D., in violation of the right to life granted by the American Declaration of the Rights and Duties of Man, as clarified by the definition and description of the American Convention on Human Rights (See Amplificatory Document p.1).
>
> Place and date of the violation: Boston City Hospital, Boston, Massachusetts, October 3, 1973, U.S. Supreme Court Building, Washington, D.C. January 22, 1973.
>
> Local authority who took cognizance of the act and the date on which this occurred: District Atrorney's Office, Boston, Massachusetts.

Judge or court which took cognizance of the act and the date on which this occurred: Superior Court of Boston, Massachusetts, Judge McGuire sitting, April 5-11, 1976.

Final decision of the authority (if any) that acted in the matter; The Supreme Judicial Court of Massachusetts, Boston, Massachusetts, acquitted Edelin on appeal, on December 17, 1976.

In the case of it not being possible to have recourse to a local authority, judge or court, explain the reasons for such impossibility: On a related point, no appeal to the Supreme Court of the United States is possible. (See Amplificatory Document, p.6).

List the names and addresses of witnesses to the act (if any) or enclose the corresponding documents: Exhibit A: Official copy of the decision of the Supreme Judicial Court of Massachusetts in the case of Commonwealth vs. Edelin; Exhibit B: "Working and Waitinz,"The Washington Post, Sunday, August 1, 1976.

The undersigned should indicate whether they wish their identity to be withheld: No withholding is necessary.

3. In the "Amplificatory Document" attached to the petition; the petitioners add, inter alia, the following information and arguments:

a) The victim in this case, a male child not yet come to the normal term of pregnancy, has from the beginning been identified by the Massachusetts authorities only as "Baby Boy", Exhibit A, p.ll, line 7 of Case S-393 SJC, Commonwealth/of Massachusetts/vs. Kenneth Edelin.

b) This violation of the following rights granted by the American Declaration of the Rights and Duties of Man, Chapter 1, Article I ("... right to life...", Article II ("All persons are equal before the law... without distinction as to race, sex, language, creed, or any other factor," here, age), Article VII ("All children have the right to special protection, care, and aid") and Article XI ("Every person has the right to the preservation of his health...") began on January 22, 1973, when the Supreme Court of the United States handed down its decisions in the cases of Roe vs. Wade, 410 U.S. 113[1] and Doe vs. Bolton, 410 U.S. 179.

c) The effect of the Wade and Bolton decisions, supra, in ending the legal protection of unborn children set the stage for the deprivation of "Baby Boy's right to life. These decisions in and of themselves constitute a violation of his right to life, and the United States of America therefore stands accused of a violation of Chapter 1, Article I of the American Declaration of the Rights and Duties of Man.

The United States Government, through its Supreme Court, is guilty of that violation.

d) At trial, the jury found Dr. Edelin guilty of manslaughter, necessarily finding as fact that the child was such as to fit within a "protectable exception" (over six months past conception and/or alive outside the womb) to the Supreme Court of the United States' rubric in the Wade and Bolton cases. On appeal, the Supreme Judicial Court of Massachusetts reversed, on these grounds;

1) Insufficient evidence of "recklessness" and "belief in" [or concern about] "the viability of the fetus" (paraphrased). Exhibit A, p.190, line 17 to p.19, line 6.

2) Insufficient evidence of life outside the womb. Exhibit A, p.22, line 5, to p.25, line 1.

3) Procedural error. Exhibit A, p.25, line 2 to p29, line 7.

e) This decision came down on December 17, 1976, and, by preventing Dr. Edelin from being punished for his acts, put the State of Massachusetts in the posture of violating "Baby Boy's" right to life under the Declaration.

f) The Supreme Court of the United States has no jurisdiction in this matter, since the grounds for reversal given in the opinion of the Supreme Judicial Court's opinion is based on points of law that are purely state matters, and Edelin's rights were not violated by his being held harmless. Evidentiary sufficiency on the elements of a crime and matters of state court procedure may be addressed by the Supreme Court of the United States, or any other U.S. Federal Court, only where the state has not considered the matter.

4. Exhibit A, attached to the petition, is a xerox copy of the full text of the decision of the Massachusetts Supreme Judicial Court in the case of Commonwealth vs. Kenneth Edelin

5. On April 1, 1977, Mary Ann Kreitzer (4011 Franconia Rd. Alexandria, Va. 22310) wrote a letter to the Commission, on behalf of herself and six other persons, asking "to be considered as complainants in the communications brought before the Commission by Mrs. Potter and White and Catholics for Christian Political Action concerning the Edelin case...".

6. Later, a similar request was made by Reverend Thomas Y. Welsh, Bishop of Arlington (200 North Glebe Rd. Arlington, Va.), Frederick C. Greenhalge Jr. (Box 1114, Los Gatos, Santa Clara County, California 95030) and Lawyers for Life, represented by Joseph P. Meissner (Room 203 3441 Lee Road, Shaker Heights, Ohio 44120).

7. By a letter of May 5, 1977, the petitioners submitted to the consideration of the Commission four questions on what reservations are acceptable to the American Convention on Human Rights.

8. The Commission, at its 41st Session (May, 1977) decided to name a rapporteur to prepare a note to the Government concerned, but at its 42nd Session, adopting a

recommendation made by its Ad Hoc Committee, the Commission directed the Secretariat to forward to the Government of the state in question the pertinent parts of the petition and to request the usual information.

9. By a note of July 20, 1978, the Chairman of the Commission requested the Secretary of State of the United States to supply the information deemed appropriate, in accordance with articles 42 and 54 of its Regulations.

10. On January 26, 1979 the Commission received a letter from the petitioner stating:

> The United States having failed to reply to your Commission's letter of inquiry of July 20, 1978, within the 180 days permitted by your Commission's regulations (article 51), the regulations now require you to regard the allegations of fact as proven (article 51).

11. On February 22, 1979, Ambassador Gale McGee, Permanent Representative of United States to the Organization of American States submitted to the Commission's "a memorandum prepared within the Department of State replying to the principal points raised by the complainants."

12. A preliminary question was raised in the United States response:

> With respect to the exhaustion of legal remedies in the Edelin case, decisions of state supreme courts are appealable to the U.S. Supreme Court. However, no appeal was taken in this case and the time for appeal has now lapsed.

13. On the facts referred to by the petition, the memorandum states:

> The specific case brought to the attention of the Commission is that of "Baby Boy", the name given to the fetus removed by Dr. Kenneth Edelin in performing an abortion in Boston on October 3, 1973. Dr. Eldelin was indicted for manslaughter on the basis of that abortion and convicted after trial. The Supreme Judicial Court of Massachusetts reversed the conviction and directed the entry of a judgment of acquittal on December 17, 1976. The Court found that there was insufficient evidence to go to a jury on the overarching issue whether Dr. Edelin was guilty beyond a reasonable doubt of the "wanton" or "reckless" conduct resulting in a death required for a conviction, and that motions for a direct verdict of acquittal should have been granted.

14. The U.S. Government response, on the substantive questions raised by the complainant, is developed in a three part argument that the right-to-life provisions of the American Declaration on the Rights and Duties of Man was not violated, even in the hypothesis that the American Convention on Human Rights could be used as a means of interpretation in this case:

> a) With regard to the right to life recognized by the Declaration, it is important to note that the conferees in Bogotá in 1948 rejected language

which would have extended that right to the unborn. The draft placed before them had been prepared by the Inter-American Juridical Committee. Article 1 of that draft provided:

Toda persona tiene derecho a la vida, inclusive los que están por nacer así como también los incurables, dementes y débiles mentales. (Every person has the right to life, including those who are not yet born as well as the incurable, the insane, and the mentally retarded.) Novena Conferencia Internacional Americana,Actas y Documentos, vol V, at 449 (1948).

The Conference, however, adopted a simple statement of the right to life, without reference to the unborn, and linked it to the liberty and security of the person. Thus it would appear incorrect to read the Declaration as incorporating the notion that the right to life exists from the moment of conception. The conferees faced this question and chose not to adopt language which would clearly have stated that principle.

b) While the American Convention on Human Rights clearly was intended to complement the Declaration, these two documents exist on different legal planes and must be analyzed separately. The Declaration, adopted as a resolution at the Ninth International Conference of American States in Bogotá in 1948, provides a statement of basic human rights. It was adopted by unanimous vote, the United States participating. When the Commission was created in 1959, the Declaration gave form to its charge to protect the observance of human rights in the Americas. The Convention, however, is a treaty which has only recently entered into force among 13 states, not including the United States. It defines in detail the human rights which its parties undertake to observe. The specificity of those rights, in comparison with the ones enumerated in the Declaration, suggests the need for their being undertaken by treaty. While the vagueness of the rights described in the Declaration may leave substantial room for interpretation by the Commission, that interpretation must be consistent with the intentions of those who adopted the Declaration. In particular cases, the Convention may or may not provide accurate guidelines for defining the terms of the Declaration.

c) Although the scope of the right to life recognized by the Convention is not directly in issue here, the complainants' analysis of that point warrants some comment. Paragraph 1 of Article 4 of the Convention describes the right to life in the following terms:

Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life.

At the second plenary session of the San José conference, the U.S. and Brazilian delegations placed the following statement on the record:

The United States and Brazil interpret the language of paragraph 1 of Article 4 as preserving to State Parties discretion with respect to the content of legislation in the light of their own social development, experience and similar

factors. (Conferencia Especializada Interamericana sobre Derechos Humanos, Acta de la segunda sesión plenaria, OEA/Ser.K/XVI/1.2, at 6).

When dealing with the issue of abortion, there are two aspects of the Convention's elaboration of the right to life which stand out. First, the phrase "in general". It was recognized in the drafting sessions in San José that this phrase left open the possibility that states parties to a future Convention could include in their domestic legislation "the most diverse cases of abortion." (Conferencia Especializada Interamericana sobre Derechos Humanos, OEA/Ser.K/XVI/1.2, at 159.) Second, the last sentence focuses on arbitrary deprivations of life. In evaluating whether the performance of an abortion violates the standard of Article 4, one must thus consider the circumstances under which it was performed. Was it an "arbitrary" act? An abortion which was performed without substantial cause based upon the law could be inconsistent with Article 4.

15. The State Department memorandum responded also the petitioners' allegations related to the opinion of U.S. Supreme Court and the Supreme Judicial Court of Massachusetts on abortion:

Complainants allege that the decisions of the U.S. Supreme Court in Wadeand Bolton (Attachments A and B) imported "absolute arbitrariness" into the decision whether an abortion shall be performed in a particular case. In fact, what the Supreme Court did in these cases was to establish Constitutional guidelines for state law regulating abortions. These guidelines were not developed in an arbitrary fashion.

The issue before the Court in Roe v. Wade was whether a state criminal abortion statute that excepted from criminality only a life-saving procedure on behalf of the mother was Constitutional.[2] The Court found that it limited the exercise of a "fundamental right" --the right to privacy[3] --in a manner inconsistent with the compelling state interests" which could justify regulation of that right. It is a basic tenet of U.S. Constitutional law that States may limit the exercise of fundamental rights only when they can show a compelling state interest in doing so, and legislative enactments toward that end must be narrowly drawn to express only the legitimate state interests at stake. The Court identified two interests which could form the basis for legitimate state regulation of abortions during certain stages of pregnancy--the mother's health (as distinguished from her life) for the stage subsequent to approximately the end of the first trimester and the potential life of the fetus for the stage subsequent to viability. For the first trimester, the Court has left the abortion decision and its effectuation to the medical judgment of the pregnant woman's attending physician, 410 U.S. 113, 164.

Complainants allege that, by this decision, the U.S. Supreme Court has sanctioned the arbitrary killing of human fetuses during the first six months of development. In fact the Court expressly rejected the contention "that the woman's right is absolute and that she is entitled to terminate her pregnancy at whatever time, in whatever way, and for whatever reason she alone choses." The Court declared that the right to privacy was not absolute and that its

exercise could be limited by valid state regulations drafted in conformity with the guidelines described above. Each state statute must be weighed against the basic Constitutional criteria established by the Court.

In Commonwealth v. Edelin, the abortion was performed in the interim between the announcement of the Wade decision, which rendered inoperative the Massachusetts criminal abortion statute, and the enactment of new state legislation on abortions. From January 1973 until August 1974, there were no legal restrictions on the performance of abortions per se in Massachusetts, and Dr. Edelin was prosecuted under a manslaughter statute. He was acquitted; the record amply demonstrates the difficulty of bringing the facts of a legal abortion within the terms of a manslaughter statute. It does not establish, however, that the abortion was performed "arbitrarily." Complainants note that the Edelinopinion does not explain the factors which went into the decision to perform the abortion; the court makes only passing reference to the pregnant girl's and her mother's "having requested an abortion." Had the case been tried under the 1974 Massachusetts legislation on abortions (Attachment C), this aspect would have been fully explored. However, it was not a central issue under the theory of manslaughter advanced by the Commonwealth. Thus, the record is silent as to the pregnant girl's motivation or medical need in seeking an abortion, and the Edelin case cannot legitimately be seen a sanctioning a "mother's desire to kill (unborn children) for improper reasons or no reason at all." Complainant's Amplificatory (sic) Document, at 3. It seems worth noting, however, that, at the time of the abortion, Dr. Edelin estimated the gestational period as twenty to twenty-two weeks- under the time generally believed required to produce a viable fetus" and he did not believe the fetus was viable. The Court found nothing to impeach his good faith judgment in this regard.

16. Attached to the V.S. response are copies of the full texts of the opinions in Roe v. Wade and Doe v. Bolton, ant Sections 12K - 12Y Chapters 112 of the Annotated Laws of Massachusetts.

17. On June 12, 1979, the petitioners' reply to the U.S. Government response stated in summary that:

a) The State Department memorandum [implies] near-confession its guilt in this case.

b) The U.S. Government has made no reply to the allegations of Messrs. Potter and White as to the large numbers of abortions and the high proportion of unjustified abortions performed merely for the sake of convenience, and has not denied that U.S. Supreme Court has forbidden protection of the lives of the unborn for the first 24 weeks of prenatal existence.

c) The Government is incorrect in sustaining that, in the Edelin case the internal legal remedies have not been exhausted because the appellate jurisdiction of the U.S. Supreme Court is strictly limited, both as to appeals of right and as to the writ of certiorari.

d) The history of the development of the American Declaration demonstrates that the U.S. argument is incorrect, because the change in working was made simply and solely for purposes of simplification and not in order to alter the content of the document.

e) The Wade and Bolton opinions, as the U.S. Government admits, rendered the Massachusetts criminal abortion statute inoperative and had the same effect, generally, on other State abortion statutes. This destroyed the legal protection of the lives of the unborn.

f) The term "in general" cannot be viewed as applying only to the prenatal period, by reason of the logical structure and wording of the statement of the right to life, and the other life-affecting aspects, of the Declaration and the Convention. These aspects of these two documents, such as limitations upon executions for capital crimes, must be "read into" the phrase "in general".

g) History clearly demonstrates that numerous human rights violations have been based upon orderly processes for creating law, as in the Wade and Bolton cases.

18. In their reply to the response of the U.S. Government, the petitioners make frequent reference to the Annex to Amplificatory Document, filed by Messrs. Potter and White on June 8, 1978. This document is the result, in the opinion of the petitioners, of research based on the Records of the Ninth International Conference of American States and other related publications done to prove that the term "life" in article 1 of the Declaration of Bogotá of 1948 on human rights ant duties was, in fact, defined by the drafters and promulgators of that Declaration so as to protect the individual's right to life "from the moment of conception."

19. On July 27, 1979, Messrs. Thomas Y. Yank, Henry Y. Hyde, Charles F. Dougherty and Daniel E. Lungren, Members of the U.S. Congress, House of Representatives, requested that the Commission inform them with regard to case 2141:

> Assuming that plenary Commission handling of this complaint is impending, we would like to know whether, if the United States loses, it would be subject to trade and diplomatic sanctions similar to those imposed upon Cuba by the O.A.S. following, and partially on account of, the human rights violations of the Castro regime?

Can the Commission suggest to the undersigned Members of Congress how legislation might be shaped in order to eliminate any doubts as to U.S. compliance with IACHR standards in this regard?

> We naturally sympathize with the Commission's aims and purposes, and send these questions in a spirit of cooperation and with the intent of furthering the work of the Commission.

20. Considering the case ready for decision, the Commission, in its 50 Session (September-October 1980), appointed Professor Carlos A. Dunshee de Abranches as rapporteur to prepare the appropriate draft report, in accordance with article 24 of its present

Statute and article 49 of its previous Regulations.

WHEREAS:

1. The basic facts described in the petition as alleged violations of articles I, II, VII and IX of the American Declaration occurred on January 22, 1973 (date of the decisions of cases Roe v. Wade and Doe v. Bolton by U.S. Supreme Court), October 3, 1973 (date of abortion of Baby Boy performed at the Boston City Hospital) and December 17, 1976 (date of final decision of the Supreme Judicial Court of Massachusetts that acquitted Dr. Edelin, the performer of the abortion.) The defendant, the U.S. Government is not a state party to the American Convention on Human Rights. The petition was been filed on January 19, 1977, before the Convention entered into force on July 18, 1978.

2. Consequently, the procedure applicable to this case is that established in articles 53 to 57 of Regulations of the Commission, approved in 1960 as amended, in accordance with article 24 of the present Statute and article 49 of the new Regulations.

3. Communications that denounce the violation of the human rights set forth in Article 53 must be addressed to the Commission within six months following the date on which, as the case may be, the final domestic decision has been handed down..." (article 55 of the 1960 Regulations). However, the 1980 Regulations, maintaining the same rule, clarifies that the initial term of the six months shall be the date on which the party has been notified of the final ruling in cases in which the remedies under domestic law have been exhausted (article 35.1 applicable to States that are not Parties to the Convention as provided in article 49).

4. The petitioners were not parties in the case Commonwealth of Massachusetts vs. Kenneth Edelin, in which the final ruling by the Supreme Judicial Court of Massachusetts was delivered on December 17, 1976 (Exhibit A attached to the petition.) So they have not been notified of this said opinion, but in this case the point is irrelevant because the petition was filed with the Commission on January 19, 1977, only 32 days after the final ruling of State Court.

5. The Commission shall verify, as a condition precedent to exercising its jurisdiction, whether the internal legal procedures and remedies have been duly applied and exhausted (article 9 bis d of the Statute and article 54 of the Regulations both of 1980 as amended.)

6. The defendant sustains that decisions of state courts are appealable to the U.S. Supreme Court decision, but that no appeal was taken in this case. Conversely, the complainants replied that the jurisdiction of the U.S. Supreme Court to review state court decisions by appeal or by writ of certiorari is limited to specific situations, none of which are applicable in this case. (See the reasoning transcribed in N. 3, g, of this Report.)

7. The facts of the case are not in controversy. The text of the decision of the Supreme Judicial Court of Massachusetts, produced by petitioners, was accepted as authentic. Only the merits are under scrutiny. The consideration of those facts and the terms of such decision and the analysis of rules and precedents of U.S. Supreme Court, applicable to this case, indicate that there was no internal remedy to be exhausted by the petitioners before applying to the international jurisdiction.

8. The factual bases for this conclusion are the following:

a) On October 3, 1973, the defendant Dr. Renneth Edelin, Chief Resident in obstetrics and gynecology at Boston City Hospital, performed an abortion by hysterectomy on a seventeen year old, unmarried woman, she and her mother having requested an abortion and consented to the operation. For his conduct in connection with the operation, Dr. Edelin was indicted for manslaughter, and convicted after trial. He appeals from the judgment of conviction and from the trial judge's refusal of a new trial.

b) In Massachusetts, for many years a criminal abortion statute (G. L. c. 272, S 19) had had the effect in the Commonwealth of punishing as a crime the performance of any abortion except when carried out by a physician "in good faith and in an honest belief that it (was) necessary for the preservation of the life or health of a woman."

c) On January 22, 1973, the Supreme Court of the United States decided the cases of Roe v. Wade, 410 U.S. 113, and Doe v. Bolton, 410 U.S. 179. These decisions not only "rendered inoperative" the Massachusetts criminal abortion statute, as the State Court had occasion to say in Doe v. Doe, (365 Mass. 556, 560 (1974), but introduced a new regime affording Constitutional protections as follows (quoting from Wade, 410 U.S. at 164-165):

> "a) For the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician.
>
> "b) For the stage subsequent to approximately the end of the first trimester, the State, in promoting its interest in the health of the mother, may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health.
>
> "c) For the stage subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother."

d) All six Justices of Supreme Judicial Court of Massachusetts who heard the appeal, holding that there was error in the proceedings at trial, vote to reverse the conviction. Five Justices also vote to direct the entry of a judgment of acquittal; the Chief Justice, dissenting in part in a separate opinion, would order a new trial. The five Justices are agreed that there was insufficient evidence to go to a jury on the overarching issue whether Dr. Edelin was guilty beyond a reasonable doubt of the "wanton" or "reckless" conduct resulting in a death required for a conviction herein, and that motions for a directed verdict of acquittal should have been granted accordingly. "The judgment is reversed and the verdict set aside. Judgment of acquittal is to be

entered. So ordered."

e) The highest Court, in the conclusion of its opinion, states: This opinion does not seek an answer to the question when abortions are morally justifiable and when not. That question is wholly beyond our province. Rather we have dealt with a question of guilt or innocence under a particular state of facts. We are conscious that the significance of our decision as precedent is still further reduced by the fact that the case arose in an interregnum between the Supreme Court's abortion decisions of 1973 ant the adoption of legislation intended to conform to those decision--a kind of internal circumstance not likely to be repeated. (See Exhibit A pages 1, 2, 3 and 29.)

9. The jurisdiction of the Supreme Court to review decisions of the state courts is based upon 28 U.S.C. S 1257, which reads as follows:

"Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

"(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.

"(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States and the decision is in favor of its validity.

"(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of or commission held or authority exercised under, the United States." (United States Code-1976 Edition - U.S. Government Printing Office.)

10. There is no ground in this case for applying the sanction established in article 51 of the 1960 Regulation as amended: -the presumption of truth of the alleged facts. The petitioners affirmation is correct in noting that the State Department response was received in the Commission 32 days after the expiry of the time limit of 180 days, but this rule is flexible. That term may be extended in cases in which the Commission deems justifiable (article 51.2.) The nature, complexity and importance of the many legal, moral and scientific issues disputed in this case justify the reasonable delay in the Government's response.

11. Furthermore, there is no reason to declare as presumed the truth of facts described in the petition if both parties in this case agree, as it is evident from the examination of the file, that such facts are not in controversy. However, it is opportune to clarify that in this case there is no logical or legal relation between the presumption of the truth of the facts, described by the petitioners and the request involving legal issues, as set forth in the petition of January 22, 1979 (see n. 12 of this report.)

12. The last preliminary question to be resolved is the admissibility of the request made to this Commission by four honorable Members of the Congress of the United States of an advisory opinion related to the consequences of an eventual decision of the Commission adverse to the United States.

13. Since its creation, the Commission has competence to serve the Organization of American States as an advisory body in respect of human rights (Statute 1960 article 9c). This function has been confirmed by article 112 of the Charter of the OAS (as amended by the Protocolo of Buenos Aires, 1967), ratified by the United States of America on April 23, 1968. The new Statute of the Commission, approved by the General Assembly in October, 1979, provides that the Commission shall have power with respect to the member states of the Organization "to respond to inquiries made by any member state through the General Secretariat of the Organization on matters related to human rights in that state and, within its possibilities, to provide those states with the advisory services they request." (article 18 c).

14. This article shows clearly that inquiries by members of the congress or any other power or authority of a Member State, to be considered by the Commission, must be officially forwarded through the international representative of such State in the Organization. Without prejudging the substance of the opinion requested, the Commission shall comply, at any time, with the duty to respond such an inquiry if it is properly submitted to this advisory body.

15. The international obligation of the United States of America, as a member of the Organization of American States (OAS), under the jurisdiction of the Inter-American Commission on Human Rights (IACHR) is governed by the Charter of OAS (Bogotá, 1948) as amended by the Protocol of Buenos Aires on February 27, 1967, ratified by United States on April 23, 1968.

16. As a consequence of articles 3 i, 16, 51 e, 112 and 150 of this Treaty, the provisions of other instruments and resolutions of the OAS on human rights, acquired binding force. Those instruments and resolutions approved with the vote of U.S. Government, are the following:

- American Declaration of the Rights and Duties of Man (Bogotá, 1948)
- Statute and Regulations of the IACHR 1960, as amended by resolution XXII of the Second Special Inter-American Conference (Rio de Janeiro, 1965)
- Statute and Regulations of IACHR of 1979-1980.

17. Both Statutes provide that, for the purpose of such instruments, the IACHR is the organ of the OAS entrusted with the competence to promote the observance and respect of human rights. For the purpose of the Statutes, human rights are understood to be the rights set forth in the American Declaration in relation to States not parties to the American Convention on Human Rights (San José, 1969). (Articles 1 and 2 of 1960 Statute and article 1 of 1979 Statute).

18. The first violation denounced in the petition concerns article I of the American Declaration of Rights and Duties of Man: "Every human being has the right to life...". The petitioners admitted that the Declaration does not respond "when life begins,"

"when a pregnancy product becomes a human being" or other such questions. However, they try to answer these fundamental questions with two different arguments:

a) The travaux preparatoires, the discussion of the draft Declaration during the IX International Conference of American States at Bogotá in 1948 and the final vote, demonstrate that the intention of the Conference was to protect the right to life "from the moment of conception."

b) The American Convention on Human Rights, promulgated to advance the Declaration's high purposes and to be read as a corollary document, gives a definition of the right to life in article 4.1: "This right shall be protected by law from the moment of conception."

A brief legislative history of the Declaration does not support the petitioner's argument, as may be concluded from the following information and documents:

a) Pursuant to Resolution XL of the Inter-American Conference on Problems of War and Peace (Mexico, 1945), the Inter-American Juridical Committee of Río de Janeiro, formulated a preliminary draft of an International Declaration of the Rights and Duties of Man to be considered by the Ninth International Conference of American States (Bogotá, 1948). This preliminary draft was used by the Conference as a basis of discussion in conjuction with the draft of a similar Declaration prepared by the United Nations in December, 1947.

b) Article 1 - Right to Life - of the draft submitted by the Juridical Committee reads: "Every person has the right to life. This right extends to the right to life from the moment of conception; to the right to life of incurables, imbeciles and the insane. Capital punishment may only be applied in cases in which it has been prescribed by pre-existing law for crimes of exceptional gravity." (Novena Conferencia International Americana - Actas y Documentos Vol. V Pág. 449).

c) A Working Group was organized to consider the observations and amendments introduced by the Delegates and to prepare an acceptable document. As a result of its work, the Group submitted to the Sixth Committee a new draft entitle American Declaration of the Fundamental Rights and Duties of Man, article I of which reads: "Every human being has the right to life, liberty, security and integrity of this person."

d) This completely new article I and some substantial changes introduced by the Working Group in other articles has been explained, in its Report of the Working Group to the Committee, as a compromise to resolve the problems raised by the Delegations of Argentina, Brazil, Cuba, United States of America, Mexico, Peru, Uruguay and Venezuela, mainly as consequence of the conflict existing between the laws of those States and the draft of the Juridical Committee. (Actas y Documentos Vol. 5 pages 474-484, 495-504, 513-51S.

e) In connection with the right to life, the definition given in the

Juridical Committee's draft was incompatible with the laws governing the death penalty and abortion in the majority of the American States. In effect, the acceptance of this absolute concept--the right to life from the moment of conception--would imply the obligation to derogate the articles of the Penal Codes in force in 1948 in many countries because such articles excluded the penal sanction for the crime of abortion if performed in one or more of the following cases: A-when necessary to save the life of the modern; B-to interrupt the pregnancy of the victim of a rape; C-to protect the honor of an honest woman; D-to prevent the transmission to the fetus of a hereditary on contagious disease; E-for economic reasons (angustia económica).

f) In 1948, the American States that permitted abortion in one of such cases and, consequently, would be affected by the adoption of article I of the Juridical Committee, were; Argentina - article 86 n.1, 2 (cases A and B); Brasil - article n.I, II (A and B); Costa Rica - article 199 (A); Cuba - article 443 (A, B and D); Ecuador -article 423 n.l, 2 (A and B); Mexico (Distrito y Territorios Federales) - articles 333e 334 (A and B); Nicaragua - article 399 (frustrated attempt) (C); Paraguay - article 352 (A); Peru - article 163 (A-to save the life or health of the mother); Uruguay - article 328 n. 1-5 (A, B, C. and F - the abortion must be performed in the three first months from conception); Venezuela - article 435 (A); United States of America - see the State laws and precedents[4]; Puerto Rico S S 266, 267 (A) (Códigos Penales Iberoamericanos - Luis Jiménez de Asua - Editorial Andrés Bello - Caracas, 1946 - volúmenes I y II).

g) On April 22, 1948, the new article I of the Declaration prepared by the Working Group was approve by the Sixth Committee with a slight change in the wording of the Spanish text (there was no official English text at that stage) (Actas y Documentos) vol. V pages 510-516 and 578). Finally, the definitive text of the Declaration in Spanish, English, Portuguese and French was approved by the 7th plenary Session of the Conference on April 30, 1948, and the Final Act was signed May 2nd. The only difference in the final text is the elimination of the word "integrity" (Actas y Documentos vol. VI pages 297-298; vol. I pages 231, 234, 236, 260, 261).

h) Consequently, the defendant is correct in challenging the petitioners' assumption that article 1 of the Declaration has incorporated the notion that the right of life exists from the moment of conception. Indeed, the conference faced this question but chose not to adopt language which would clearly have stated that principle.

20. The second argument of the petitioners, related to the possible use of the Convention as an element for the interpretation of the Declaration requires also a study of the motives that prevailed at the San José Diplomatic Conference with the adoption of the definition of the right to life.

21. The Fifth Meeting of Consultation of Ministers of Foreign Affairs of the OAS, held at Santiago, Chile in 1959, entrusted the Inter-American Council of Jurists with the preparation of a draft of the Convention on Human Rights contemplated by the American States since the Mexico Conference in 1945.

22. The draft, concluded by the Commission in about two weeks, developed the American Declaration of Bogotá, but has been influenced also by other sources, including the work in course at the United Nations. It consists of 88 articles, begin with a definition of the right to life (article 2), which reintroduced the concept that "This right shall be protected by law from the moment of conception." (Inter-American Year-book, 1968 - Organization of American States, Washington, 1973 - pages 67, 237.)

23. The Second Special Conference of Inter-American States (Rio de Janeiro, 1965) considered the draft of the Council with two other drafts presented by the Governments of Chile and Uruguay, respectively, and asked the Council of the OAS, in cooperation with the IACHR, to prepare the draft of the Convention to be submitted to the diplomatic conference to be called for this purpose.

24. The Council of the OAS, considering the Opinion enacted by the IACHR on the draft convention prepared by the Council of Jurists, give a mandate to Convention to be submitted as working document to the San José conference (Yearbook, 1968, pages 73-93.)

25. To accommodate the views that insisted on the concept "from the moment of conception," with the objection raised, since the Bogota Conference, based on the legislation of American States that permitted abortion, inter alia, to save the mother's life, and in case of rape, the IACHR, redrafting article 2 (Right to life), decided, by majority vote, to introduce the words "in general." This compromise was the origin of the new text of article 2 "1. Every person has the right to have his life respected. This right shall be protected by law, in general, from the moment of conception." (Yearbook, 1968, page 321.)

26. The rapporteur of the Opinion proposed, at this second opportunity for discussion of the definition of the right of life, to delete the entire final phrase "...in general, from the moment of conception." He repeated the reasoning of his dissenting opinion in the Commission; based on the abortion laws in force in the majority of the American States, with an addition: "to avoid any possibility of conflict with article 6, paragraph 1, of the United Nations Covenant on Civil and Political Rights, which states this right in a general way only." (Yearbook, 1968 - page 97).

27. However, the majority of the Commission believed that, for reasons of principle, it was fundamental to state the provision on the protection of the right to life in the form recommended to the Council of the OAS in its Opinion (Part One). It was accordingly decided to keep the text of paragraph 1 without change. (Yearbook, 1968, page 97).

28. In the Diplomatic Conference that approved the American Convention, the Delegations of Brazil and the Dominican Republic introduced separate amendments to delete the final phrase of paragraph 1 of article 3 (Right to life) "in general, from the moment of conception". The United States delegation supported the Brazilian position. (Conferencia Especializada Interamericana sobre Derechos Humanos - ACTAS Y DOCUMENTOS - Washington 1978 (reprinted) - pages 57, 121 y 160.)

29. Conversely, the Delegation of Ecuador supported the deletion of the words "and in general". Finally, by majority vote, the Conference adopted the text of the draft submitted by the IACHR and approved by the Council of the OAS, which became the present text of article 4, paragraph 1, of the American Convention (ACTAS Y

DOCUMENTOS - pages 160 and 481.)

30. In the light of this history, it is clear that the petitioners' interpretation of the definition given by the American Convention on the right of life is incorrect. The addition of the phrase "in general, from the moment of conception" does not mean that the drafters of the Convention intended to modify the concept of the right to life that prevailed in Bogota, when they approved the American Declaration. The legal implications of the clause "in general, from the moment of conception" are substantially different from the shorter clause "from the moment of conception" as appears repeatedly in the petitioners' briefs.

31. However, accepting gratia argumentandi, that the American Convention had established the absolute concept of the right to life from the moment of conception - it would be impossible to impose upon the United States Government or that of any other State Member of the OAS, by means of "interpretation," an international obligation based upon a treaty that such State has not duly accepted or ratified.

32. The question of what reservation to article I of the Convention should be admissible, as suggested by President Jimmy Carter in his Letter of Transmittal to the Senate on February 23, 1978, has no direct link with the objective of the petition. This is not the appropriate place or opportunity for the consideration of this matter.

33. The other rights which the petitioners contend were violated --Articles II, VII and XI of the American Declaration--have no direct relation to the facts set forth in the petition, including the decision of the U.S. Supreme Court and the Supreme Judicial Court of Massachusetts which were challenged in this case.

THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS

RESOLVES:

1. The decision of the U.S. Supreme Court and the Supreme Judicial Court of Massachusetts and other facts stated in the petition do not constitute a violation of articles I, II, VII and XI of the American Declaration of Rights and Duties of Man.

2. This decision must be transmitted to the petitioners and the U.S. Government.

3. To include this resolution in the Commission's Annual Report.

Chairman Tom J. Farer, Second Vice Chairman Francisco Bertrand Galindo, and Doctors Carlos A. Dunshee de Abranches, Andrés Aguilar, and César Sepúlveda concurred in approving this resolution. Dr. Aguilar presented a concurring explanation of his vote. Doctors Marco Gerard Monroy Cabra and Luis Demetrio Tinoco Castro presented separate, dissenting, explanation of their votes. Those explanations of votes are included as appendices to this resolution.

---

[1] 410 U.S. 113" means United States Reports, vol. 410, p.113. This explanation is offered for the benefit of persons unfamiliar with United States systems of legal reporting and case citation.

[2] The object of scrutiny in Doe v. Bolton was a more sophisticated modern statute regulating the

performance of abortions. The opinion applies the principles developed in Wade and thus does not warrant further discussion here.

[3] It should be noted that the right to privacy is an extension of the right to personal liberty guaranteed by the Fourteenth Amendment to the U.S. Constitution. Article I of the American Declaration on the Rights and Duties of Man joins the rights of life and liberty as basic rights.

[4] Daniel Callahan - Abortion: Law, Choice and Morality. William A.Nolen - The Baby in the Bottle - Cowarn, McCann & Geoghengan, Inc. -New York, 1978; 410 U.S. 113 provites a list of the articles of State's Penal Codes and similar statutes on abortion in existence in a majority of states in 1973 (pages 118-119).